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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

## No. 758

ANTOINE BONTZ,
*Appellant,*

vs.

STATE OF KANSAS,
*Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

## MOTION TO DISMISS AND/OR AFFIRM

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

### MOTION TO DISMISS AND/OR AFFIRM

Appellee in the above entitled case moves to dismiss the appeal or affirm the finding of the Supreme Court of the State of Kansas for the reason that the question presented is not a substantial constitutional question.

## QUESTION

Does the Kansas Worthless Check Law violate the Federal statutes of Bankruptcy by allowing abatement of the civil liability and not in abating the criminal liability.

## STATUTES INVOLVED

The pertinent Kansas check statutes are as follows:

"G.S. Kan. 1949, 21-554. Giving worthless check or draft. It shall be unlawful for any person, corporation, or partnership to draw, make, utter, issue or deliver to another any check or draft on any bank or depository for the payment of money or its equivalent, knowing, at the time of the making, drawing, uttering or delivery of any such check or draft as aforesaid that he has no funds on deposit in or credits with such bank or depository with which to pay such check or draft upon presentation."

"G.S. Kan. 1949, 21-556. Action abated upon proper showing and payment of check and costs. That in any case where a prosecution is begun under this act, the defendant shall have a right, upon application made for that purpose before trial, to have said action abated by showing to the court or judge that he has had an account in said bank upon which said check or draft was drawn, thirty days next prior to the time said check or draft was delivered and that said check or draft was drawn upon said bank without intent to defraud the party receiving the same, and if the court shall so find, said action shall be abated and the defendant shall be discharged upon paying into court the amount of such check and the costs in said case."

## ARGUMENT

The Kansas check law, G.S. Kan. 1949, 21-554, makes it a crime to make, utter, draw, or issue to another a check or draft knowing at the time that there are no funds or credits in the bank with which to pay such check or draft.

The Appellant contends that the Kansas cases hold that intent is not an element of the crime as laid out in G.S. Kan. 1949, 21-554. However, in *State* v. *Avery*, 111 Kan. 588, 207 Pac. 838 (1922), the court stated in Syllabus 1:

> "CRIMINAL LAW—Worthless check act (Laws of 1915 Ch 92) Interpreted. The offense created by the worthless check act (Laws 1915 Ch 92), making it unlawful to issue a check on a bank, knowing at the time there are no funds on deposit to meet the check on presentation, and providing punishment for any one who wilfully violates the act, is not related to the false-token bogus check, and false pretense group of crimes, the purpose of this being to discourage overdrafts and resulting bad banking, to stop the practice of 'check kiting', and generally to avoid the mischief to trade, commerce and banking which the circulation of worthless checks inflicts."

The Court also stated in *State* v. *Crane*, 136 Kan. 181, 14 P.2d 634 (1934):

> "The worthless check must be wilfully drawn, knowing at the time there are no funds on deposit to meet it. Beyond that the legislature may, for protection of the public interest, require persons to act at their peril, and may punish the doing of a forbidden act without regard to the knowledge, intent, motive, or moral turpitude of the doer."

The Court also stated that this doctrine was established in *State* v. *Avery*, 111 Kan. 588, 207 Pac. 838 (1922), and has not since been modified.

The Court in *Windle* v. *Wire*, 179 Kan. 239, 249 P.2d 213 (1956), cited *State* v. *Avery*, 111 Kan. 588, 207 Pac. 838 (1922), and stated the above doctrine again in their decision.

The principles announced in *State* v. *Avery*, *supra*, have been upheld in *State* v. *Crane*, *supra*; *State* v. *Bechtalheimer*, 151 Kan. 582, 100 P.2d 657 and *State* v. *Marshall*, 152 Kan. 607, 106 P.2d 688.

The Appellant contends that the Kansas Statute is a statute that imposes imprisonment for debt; however, the cases cited above are all specifically held that this statute does not sanction such imprisonment.

The Court in *State* v. *Morris*, 190 Kan. 93, 372 P.2d 282 (1962), in Syllabus 2 states:

> "CRIMINAL LAW—Giving Worthless Checks—Right of Abatement—Burden of Proof. G.S. Kan. 1949, 21-556, providing that the defendant maker of a worthless check has the right to apply to the court or judge before trial to abate the criminal action by showing that he had an account in the bank upon which the check was drawn 30 days next prior and that he had no intent to defraud the party receiving it, and if the court shall so find, the action may be abated, is construed to mean that the intent to defraud is present whenever money, property or other things of value is parted with by the person receiving the check, and the burden of proof is upon the defendant to negate that intent by evidence that the check was not wilfully issued, knowing at the time he had no funds on deposit in the bank to pay it upon presentation."

The Appellant relies in the most part on *In re Myers*, 119 Kan. 270, 237 Pac. 1026 (1925), where the court did hold that a discharge in Bankruptcy could be substituted for payment in an abatement hearing, however, it must be remembered that this decision was a declaratory judgment granted by the court by both the Appellant and Appellee.

The Appellant contends that the case of *State* v. *Breitenbach*, 190 Kan. 189, 373 P.2d 601, states:

> "The right to abate a criminal action afforded an offender under 21-556 is a right which he may or may not invoke. It is a privilege given by law to permit such an offender to correct an innocent mistake in issuing an insufficient fund check (State v. Morris, 190 Kan. 93, 372 P.2d 282). If the right is invoked, the offender must bring himself clearly within the terms of the statute, that is, he must show to the satisfaction of the court or judge that he has complied with the three statutory requirements: first, that he had an account in the bank 30 days next prior to the giving of the check; second, that the check was given without intent to defraud the party receiving it, and third, if the court shall so find, 'said action shall be abated and the defendant shall be discharged upon paying into court the amount of such check and the costs in said case'."

and in Syllabus 1 states:

> "Bankruptcy—Worthless Check Statute—Discharge a payment to abate. G.S. 1949, 21-556, construed and held: a discharge in bankruptcy may not be pleaded by an offender under the worthless check statute (G.S. 1949, 21-554) as payment of the check in a proceeding to abate the criminal action and obtain his discharge."

The Breitenbach case is almost identical to the present case except the present defendant was denied the right to abate by the order of Judge Kline of the District and the Supreme Court of Kansas upheld that decision, and in the Breitenbach case the defendant was allowed to abate but failed to comply with the last requirement to pay the check and the court costs.

The check laws of Kansas do require criminal intent as shown by the cases cited herein and the abatement statute G.S. Kan. 1949, 21-556, contemplates this intent when it puts the burden on the defendant to show no intent to defraud.

The Appellant relies partly upon the cases *Reitz* v. *Mealey*, 314 U.S. 33, 86 L. Ed. 21, 62 S. Ct. 24 (1941) and *Kessler* v. *Department of Public Safety*, 369 U.S. 153, 7 L. Ed. 2d 641, 82 S. Ct. 807 (1962), but both of these cases concern the safety responsibility act of state motor vehicle laws and the requirements the judgment debtors have to meet to get back driver's licenses and shows that this is not a new, novel, or substantial question, these cases are against the appellant's contention as they recognize and uphold the state's police power to prevent criminal violations.

The *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 78 L. Ed. 1230, 54 S. Ct. 695 (1934), deals with the state statute concerning the assignment of a person's future earnings in payment of a civil obligation and as such does not deal in any way with criminal statutes, so is not applicable here.

The Appellant in his statement at page 8 under "The True effect of the Kansas Worthless Check Act is to impose imprisonment for debt."

> "If fraud were an element of the crime, then of course there could be no conflict between the act and Section 17 of the Bankruptcy Act (11 U.S.C. 35), nor would the act impose imprisonment for debt, as the imprisonment would be for the tortious conduct in issuing the check."

It is very clear from reading the Kansas cases cited herein that the violation is for writing the check knowing at the time there were no funds or credits in the bank to pay the check, therefore, by the Appellant's own reasoning his appeal should be dismissed.

It is also very clear that the abatement section is a humane provision that may or may not be invoked by the defendant in cases where there were insufficient funds in the bank, but even in this case the defendant must show, "no intent to defraud", and meet the exact requirements of the statute and the court may allow abatement as a privilege not as a right.

After surveying the Kansas case cited in the Jurisdictional Statement and in the Appellee's Motion the Appellant's contention that the Kansas check law does not require criminal intent and is just a debt collection statute appears to evaporate.

The Appellant in this case was charged by the State of Kansas, not the payees of any checks, and was convicted by the District Court, and the conviction was upheld by the Supreme Court of Kansas, this is a criminal law, not a collection law.

Appellee respectfully asks this court for the reasons set out in this motion, to affirm the ruling of the Kansas Supreme Court or to dismiss the appeal of the Appellant for the reason that the question here is not a substantial

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constitutional question and does not violate the Federal Bankruptcy Act.

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